No. 77-1293

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES AUGUSTUS PETERSON, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-13) is unreported. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 1-7) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1977, and a petition for rehearing

was denied on February 15, 1978. The petition for a writ of certiorari was filed on March 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that a government agent suggested to a cooperating grand jury witness that he show his subpoena to petitioner required either petitioner's acquittal on the charge that he obstructed justice by directing the witness to lie to the grand jury or the suppression of petitioner's conversations with the witness.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of endeavoring to obstruct justice, in violation of 18 U.S.C. 1503. He was sentenced to nine months' imprisonment. The court of appeals affirmed (Pet. App. 8-13).

1. The indictment alleged that petitioner sought to influence a witness, William Frank Newman, to testify falsely before a grand jury investigating illegal gambling and conspiracy by law enforcement officers to facilitate illegal gambling. According to the indictment, petitioner attempted to have Newman supply the following false information: (1) that petitioner had nothing to do with Newman's gambling operation; (2) that Newman could not recall the substance of conversations he had with petitioner;

(3) that Newman gave no percentage of the proceeds of his gambling operations to petitioner; and (4) that Newman had no knowledge of payments to local police officials.

The government's evidence at trial showed that Newman, an employee of petitioner for many years (Tr. 88), had run two successive gambling businesses since 1970 (Tr. 91-99). Newman had opened each of these businesses after receiving petitioner's permission to operate (Tr. 92, 96-97) and had paid petitioner $150 a month, pursuant to an agreement (Tr. 74, 77). Petitioner ultimately became Newman's partner in the second establishment, opened in August 1974; thereafter, petitioner and Newman divided the proceeds equally (Tr. 98).

In August 1975, after Newman stopped operating the gambling business because of raids by the police, he talked to petitioner about reopening the business (Tr. 95-100). That same month, Newman began cooperating with the Federal Bureau of Investigation (F.B.I.) (Tr. 253-254). He agreed to let the F.B.I. monitor and record his conversations with petitioner (Tr. 101-102, 105-106), and four such conversations were recorded.[1]

The first of these conversations occurred on September 8, 1975. It primarily concerned the closing of Newman's gambling operation, and his own and

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[1] Government Exhibits 4(d), 5(d), 6(d) and 7(c) are the verbatim typewritten transcripts of the conversations, or portions of the conversations, which were introduced into evidence at trial.

petitioner's attempts to have it reopened (Gov. Ex. 4(d)). The second conversation took place on September 23, 1975. At that time petitioner, who had apparently learned of the special grand jury inquiry then being conducted into gambling, told Newman that numerous people would be receiving subpoenas and that Newman might receive a subpoena and be asked about petitioner (Gov. Ex. 5(d), p. 1). Petitioner then told Newman how to testify before the grand jury (Gov. Ex. 5(d), pp. 1-3) and how to get back into the gambling business (Gov. Ex. 5(d), pp. 2-3); he also stated that he would begin paying the police chief for permission to reopen (Gov. Ex. 5(d), p. 6). Petitioner told Newman to let him know if Newman received a subpoena (Gov. Ex. 5(d), p. 4).

The third recorded conversation occurred on January 8, 1976, after Newman had been served with a subpoena to testify before the grand jury on January 15, 1976 (Tr. 317). At the start of this conversation, Newman showed petitioner the grand jury subpoena (Gov. Ex. 6(d), pp. 1-2). Petitioner commented that "Smiley" had also received a subpoena; that Newman's subpoena was "the same one they all got"; and that his advice was "don't talk to 'em until ya get ya a lawyer" (*ibid*). Petitioner and Newman then discussed the gambling business.

Later, petitioner returned to the subject of the subpoena. He told Newman that he would be questioned about the gambling operation and those persons who worked for him; that Newman should say that

he had "fellows hustling there" and that he did not share the proceeds of the business with anyone (Gov. Ex. 6(d), pp. 14-16); that he should testify that he "don't pay nobody" and that he never gave any policeman anything (Gov. Ex. 6(d), p. 17); that when asked about petitioner and whether petitioner or the police got a share of the proceeds, Newman should testify that he knew nothing about it (Gov. Ex. 6(d), p. 19); that Newman should say that he never got started in the business because he was raided every time he tried to open (Gov. Ex. 6(d), pp. 19-20); and that Newman should not deny talking to petitioner but should say that he could not remember the contents of the conversations (Gov. Ex. 6(d), pp. 21-22).

Newman later received a letter informing him that his grand jury appearance was postponed from January 15 to January 29, 1976 (Tr. 83-84). When Newman showed this letter to petitioner during their final recorded conversation, on January 27, 1976 (Gov. Ex. 7(c), pp. 1-2), petitioner again told Newman that he would be asked if he were paying the police any money and that Newman had many reasons to say that he was paying nobody (Gov. Ex. 7(c), p. 5).

Newman testified before the grand jury on January 29, 1976, and again on March 23, 1976.

2. Prior to trial, petitioner moved to suppress the two January conversations recorded after issuance of the subpoena. He claimed that there had been an abuse of the grand jury process and prosecutorial

misconduct, alleging that Newman had used the grand jury subpoena, at the instruction of government agents, to induce a discussion of Newman's pending grand jury appearance.

At an evidentiary hearing, F.B.I. agent Freas, who had been Newman's primary government contact from the time that he became a cooperating witness, testified that he obtained the subpoena summoning Newman to appear before the grand jury (Jan. 3 S. Tr. 51).[2] The agent stated that he subsequently told Newman to show the subpoena to petitioner if the opportunity arose (*id.* at 52), and that he expected the subpoena to serve as a stimulus to conversation (*id.* at 53). Regarding the January 27, 1976, conversation, Freas testified that Newman was to engage petitioner in a conversation about gambling and also about Newman's forthcoming appearance before the grand jury (Jan. 3 S. Tr. 58). However, Freas denied that the object was to find out what petitioner would tell Newman to do concerning the subpoena, and he stated that he did not instruct Newman to ask petitioner's advice concerning it (*id.* at 53-54). He said that it was his intention to have Newman testify before the grand jury when he served him with the subpoena, that the investigation into gambling and police corruption was an ongoing one, and that he would have sent Newman out for conversations with petitioner on the two January occasions whether or not Newman had received a subpoena (*id.* at 58-59).[3]

[2] This reference is to the supplemental transcript of the January 3, 1977, evidentiary hearing, which contains the testimony of Newman and agent Freas. "Jan. 3 Tr." refers to the main transcript of that hearing.

Newman and the Strike Force attorney who had handled the investigation were also called as witnesses by petitioner. Newman confirmed that he was told to show the subpoena to petitioner, but he said that he was not instructed to ask for advice (Jan. 3 S. Tr. 22). He had previously been instructed to talk with petitioner about the gambling business (*id.* at 13). The Strike Force attorney testified that all instructions to Newman were given through agent Freas (Jan. 3 Tr. 21, 22) and that he had suggested to Freas that Newman be told to discuss gambling operations with petitioner (*id.* at 10, 12). He stated that the object of the "wiring" was purely to gather information (*id.* at 13) and that Freas was not told to tell Newman to seek advice from petitioner (*id.* at 15).

The district court denied the motion to suppress (Pet. App. 1-7). Although it believed that the "subpoena should not have been used by the United States as a bait in order to encourage [petitioner] to comment on matters then pending before the grand jury" (Pet. App. 5), it found that it was "reasonable to conclude that the grand jury subpoena was issued

[3] At trial, Freas further explained that the subpoena for Newman was obtained with the knowledge and approval of the Strike Force attorney handling the investigation (Tr. 374) and that he expected the subpoena would serve as a stimulus to conversation by petitioner concerning gambling and police corruption (Tr. 383).

for the purpose of directing William Frank Newman to appear before the grand jury" (Pet. App. 6). Since petitioner's constitutional rights had not been violated, the court viewed the issue as whether suppression was required as a matter of fundamental fairness. Based, *inter alia*, on its reading of the January transcripts, the court concluded that suppression would not be justified. The court of appeals affirmed (Pet. App. 8-13).

ARGUMENT

Petitioner contends that the government improperly used Newman and the grand jury subpoena to bait him into attempting to influence Newman's grand jury testimony. He further says that this alleged activity constituted "outrageous conduct" requiring either his acquittal under the exercise of this Court's supervisory powers or the suppression of the January conversations. These claims are without merit.

1. Although petitioner asserts that this case presents an unresolved issue concerning the entrapment defense,[4] his principal claim seems to be that his

[4] While petitioner suggests (Pet. 6) that this case affords an opportunity to resolve "whether the entrapment defense ought to be limited only to those cases in which there is no predisposition on the part of the defendant," that suggestion is incorrect because that question has already been authoritatively resolved. In *United States* v. *Russell*, 411 U.S. 423, this Court reaffirmed that the defense of entrapment is unavailable to a defendant predisposed to commit the crime. *Id.* at 433, 436. That view was sustained in *Hampton* v. *United States*, 425 U.S. 484. In his concurring opinion, relied upon by petitioner, Justice Powell specifically agreed with the plurality that "*Russell* definitively construed the defense of 'entrapment' to be focused on the question of predisposition." *Id.* at 492 n. 2.

Nor do the decisions in *United States* v. *Reifsteck*, 535 F.2d 1030 (C.A. 8), and *United States* v. *Archer*, 486 F.2d 670 (C.A. 2), reflect any conflict or confusion about the limits of the entrapment defense. In both cases, the courts recognized that the traditional entrapment defense is restricted to instances where the defendant is not predisposed to commit the crime. They noted only that this Court has not foreclosed the possibility of a distinct defense based solely on due process notions, which the *Reifsteck* court termed "entrapment as a matter of law." 535 F.2d at 1034-1035. Here, the court of appeals correctly concluded that the recognized entrapment defense was unavailable to petitioner because "the facts of this case clearly show [his] predisposition * * * to commit the crime for which he was convicted" (Pet. App. 13).

conviction on these facts violates general principles of due process. In his view, this case apparently presents circumstances "in which the conduct of law enforcement officials is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, cf. *Rochin* v. *California*, 342 U.S. 165 (1952) * * *." *United States* v. *Russell*, 411 U.S. 423, 431-432. See also *Hampton* v. *United States*, 425 U.S. 484, 489. But whatever may be the ultimate scope of this due process defense, it is plain that it has no application to the facts of this case.

The evidence in the present case shows no egregious overreaching by government officials; at most, the agents gave petitioner a convenient opportunity to commit an offense, an opportunity that he rapidly

seized. The primary purpose in serving Newman with the subpoena was to secure his appearance and testimony before the grand jury (Tr. 393). Although the agent also told Newman to show the subpoena to petitioner if the opportunity arose, that instruction was a proper method to stimulate further discussion of illegal gambling and police corruption, the matters under investigation (Tr. 383, 393). The first two recorded conversations had developed such information, and the thrust of the investigation did not change when Newman was subpoenaed. While the agent recognized that petitioner might also discuss with Newman his possible conduct before the grand jury, the incitement of such a conversation was not an overriding purpose of the subpoena but merely a conceivable by-product of its display.[5]

Even if the conduct of the government agents were thought improper, their involvement in the criminal activity was slight. In showing the subpoena to petitioner, Newman was following both past practice between the two men (Tr. 149, 152) and petitioner's own instructions in the September 23 conversation. There is no reason to suppose that petitioner would

[5] Although petitioner seems to suggest that Newman's grand jury appearance was postponed to provide an opportunity for a second discussion concerning the subpoena (Pet. 10), there is no support for this claim. Newman did appear at the meeting place of the grand jury on January 15, 1976 (Tr. 83-84). He apparently was one of at least six witnesses who had been subpoenaed for that date; three seem to have testified that day, and three, including Newman, were asked to return at a later date (Gov. Ex. 7(c), pp. 2-3).

have refrained from obstruction of justice if he had not seen the subpoena but merely had been told that Newman was to appear before the grand jury. Indeed, since it has long been established that a "witness" for purposes of 18 U.S.C. 1503 need not be subpoenaed (see, *e.g.*, *United States* v. *Griffin*, 463 F.2d 177 (C.A. 10), certiorari denied, 409 U.S. 988; *Walker* v. *United States*, 93 F.2d 792 (C.A. 8)), the action of the government in issuing a subpoena to Newman did not even supply a necessary element of petitioner's offense. Cf. *Hampton* v. *United States*, 425 U.S. 484.

This Court has upheld a conviction on similar facts in *Osborn* v. *United States*, 385 U.S. 323. There, in a prosecution for obstruction of justice based on attempted jury tampering, efforts by the defendant to bribe a juror were precipitated by the statement of a government informant that he was related to one of the jurors. The informant later falsely told the defendant that the juror was "susceptible to money" (385 U.S. at 326). Affirming the conviction despite a claim of entrapment, this Court noted that "[a]t the most, [the informant's statements] afforded the petitioner 'opportunities or facilities' for the commission of a criminal offense." 385 U.S. at 331-332.

2. As noted earlier, the district court, in denying petitioner's suppression motion, stated that the subpoena should not have been used as a "bait to encourage [petitioner] to comment on matters then pending before the grand jury" (Pet. App. 5). Peti-

tioner contends that the court thus found an abuse of process and that, having done so, it erred in refusing to suppress the January conversations. The court of appeals correctly rejected this claim.

Even if there had been an abuse of grand jury process in this case, 18 U.S.C. 3501 would preclude the courts from remedying that abuse by suppression of petitioner's inculpatory statements. *United States* v. *Di Gilio*, 538 F.2d 972, 985 (C.A. 3), certiorari denied *sub nom. Lupo* v. *United States*, 429 U.S. 1038. In any event, there was no abuse of process in this case. The district court specifically found that "the grand jury subpoena was issued for the purpose of directing William Frank Newman to appear before the grand jury" (Pet. App. 6), and that it was not relevant that an additional reason for the issuance of the subpoena might be discerned. The court of appeals upheld that conclusion, noting that the subpoena was directed not to petitioner but to Newman, a legitimate witness, who did appear and give relevant testimony before the grand jury. As the court of appeals observed: "[Newman's] appearance was a necessary step in the investigation conducted by the grand jury and the subpoena was appropriately issued to secure his appearance." (Pet. App. 12-13).

The decision in *Durbin* v. *United States*, 221 F.2d 520 (C.A.D.C.), is therefore inapposite. In *Durbin*, which was decided prior to enactment of Section 3501, the court, in reversing the defendant's conviction on other grounds, criticized the government's action in using a subpoena to restrain the defendant's move-

ments indefinitely, or until he made a statement satisfactory to the prosecutor, despite the fact that the grand jury had recessed. By contrast, petitioner's sole complaint here is that a witness was instructed to display his properly issued subpoena in the hope of "stimulating" conversation. The transcripts of the January conversations demonstrate that Newman in fact did no more than show his subpoena to petitioner, who then proceeded to instruct Newman in the false testimony that he should give. In these circumstances, the district court correctly concluded that suppression of the conversations would be unjustified.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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